No. 17–155

In the Supreme Court of the United States

ERIK LINDSEY HUGHES,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

BRIEF OF PROFESSOR RICHARD M. RE AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether this Court should abandon the *Marks* rule, which provides:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.

Marks v. United States, 430 U.S. 188, 193 (1977) (internal quotation marks and citation omitted).

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INTEREST OF THE *AMICUS CURIAE*[1]

Richard M. Re is Assistant Professor of Law at the UCLA School of Law. The interest of amicus is the sound development of precedential law. This Brief draws on the amicus's article, *Beyond the* Marks *Rule*, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090620 (hereinafter *Beyond* Marks).

SUMMARY OF ARGUMENT

1. A precedent of this Court should form only when most Justices expressly agree on a rule of decision. That simple majority rule has several advantages over the *Marks* rule. First, the majority rule would ensure that outlier views are not transformed into binding, nationwide precedents. By contrast, the *Marks* rule systematically privileges outlier views. Second, the majority rule would place control of precedent formation with the right actors—namely, the Justices of this Court, who are uniquely able to ascertain whether they do in fact agree on a rule of decision. The *Marks* rule, on the other hand, forces later courts to infer implied majority agreement or otherwise identify the "narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977). Finally, the majority rule would encourage compromise, while the *Marks* rule creates an incentive for Justices to occupy the narrowest grounds by writing separately.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than the amicus and the UCLA School of Law, financially contribute to preparing or submitting this brief. All parties have consented to this filing.

Freeman and its aftermath perfectly illustrate why the *Marks* rule is misguided. If majority agreement actually existed in *Freeman v. United States*, 564 U.S. 522 (2011), then this Court should have said so at that time, thereby averting years of litigation, judicial disagreement, and sentencing patterns that eight Justices rejected. And if no majority agreement existed when this Court decided *Freeman*, then no new precedent should have formed—thereby leaving lower courts to percolate and explore the merits.

2. The Parties here propose different versions of the *Marks* rule, but neither is persuasive.

Petitioner follows some courts in arguing that a narrow version of the *Marks* rule can reveal implied majority agreement on a rule of decision. On that view, Justices who support broad grounds of decision are logically compelled to support the "narrowest" grounds offered by other Justices. But that view rests on a fallacy. It is often possible—even obligatory—to prefer no loaf to half a loaf. Likewise, jurists who have principled reasons to insist on a broad position often have good reason to reject admittedly "narrower" alternative grounds, including because those grounds may be unprincipled. In short, there is no substitute for actual, express agreement among most Justices. When that agreement is absent, no precedent of this Court should exist.

By contrast, the United States and several courts of appeals recognize that the *Marks* rule applies precisely when this Court issues a decision that lacks any majority agreement on a rationale. But there is no persuasive reason to treat views that lack majority support as binding, nationwide precedents. A focus

on results may be defensible under a predictive model of precedent, whereby lower courts attempt to anticipate how this Court would rule. But predictions often devolve into speculation, and even accurately predicted outcomes can easily generate unprincipled patterns—which is why this Court recognizes that precedent is generally concerned with reasons and rationales, not mere outcomes.

3. Stare decisis should not protect the *Marks* rule. This Court's original statement of the rule wasn't just "badly reasoned"—it wasn't justified at all. *Cf. Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Moreover, the *Marks* rule has no persuasive foundation in pre-*Marks* judicial practice, and this Court has never attempted to explain the rule. Instead, this Court has twice indicated that the *Marks* rule is "easier stated than applied"—a strong signal that the rule has proven unworkable. *See Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (quoting *Nichols v. United States*, 511 U.S. 738, 745–46 (1994)). While courts have used the *Marks* rule increasingly often, most *Marks* applications focus on a small number of fragmented rulings. *See Beyond* Marks, at 10–16. In those cases, *Marks* has generally "defied consistent application by lower courts," yielding uncertainty that is not worth preserving. *Payne*, 501 U.S. at 829–30. On balance, the least disruptive option is to make a clean break with the *Marks* rule.

ARGUMENT

The *Marks* rule holds that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks*, 430 U.S. at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion)). Though appellate courts have cited it with increasing frequency, the *Marks* rule systematically favors outlier views, discourages compromise, and fosters confusion. Moreover, no revision of the *Marks* rule can solve these problems; in some ways, clarifying the *Marks* rule would actually make matters worse. This Court should abandon the *Marks* rule in favor of a simple majority rule: precedents of this Court should form only when a single rule of decision "enjoys the assent" of a Court majority. *Id.*

I. A Precedent of This Court Should Form Only When a Majority of the Court Agrees on a Rule of Decision

The narrowest-grounds test is objectionable no matter how it is specified. The rule's basic defect is easily stated. Precedent should not form where most Justices oppose it. And if most Justices support it, they should say so. Requiring express majority agreement helpfully affords this Court control over precedent formation. There is no good reason to force later courts to speculate as to whether this Court previously reached majority agreement. Nor is there any reason to treat minority views as precedential. If anything, the fact that only a minority of the Court

supports a particular position is a reason for caution—not a reason to foist a binding precedent on the Nation. Moreover, clarifying the *Marks* rule would actually exacerbate some of its harmful effects by encouraging Justices to rely on it, including by strategically occupying the "narrowest grounds," rather than forging majority opinions. *See Beyond* Marks (elaborating the foregoing points).

Freeman and its aftermath offer a perfect example of how the *Marks* rule causes mischief. *Marks* led many courts to follow the concurrence in the judgement—yielding federal sentencing patterns that eight Justices expressly criticized as unjustifiable. *See Freeman*, 564 U.S. at 533 (plurality opinion) (objecting to the "erroneous" rule of the concurrence in the judgment); *id.* at 544 (Roberts, C.J., dissenting) (objecting to the concurrence in the judgment as "arbitrary and unworkable"). Things would have been better without the *Marks* rule. If most Justices had agreed on a rule of decision in *Freeman*, they could simply have said so. In the absence of that agreement, the lower courts would have been left free to continue exploring the underlying merits in light of the relevant legal materials, including the opinions in *Freeman* and related cases. The new thinking that comes from percolation is especially valuable when this Court has confronted a difficult, divisive issue. So the problem with *Freeman* was not so much that this Court did not generate a majority opinion; sometimes, agreement and compromise are inappropriate. Rather, the problem was that the *Marks* rule required litigants, lower courts, and now this Court to debate whether to imbue an outlier view with the binding force of stare decisis.

Or consider *Glossip v. Gross*, 135 S. Ct. 2726 (2015), where this Court most recently used the *Marks* rule. *Glossip* found a binding precedent in *Baze v. Rees*, 553 U.S. 35 (2008), a fragmented decision that included a three-Justice plurality and a two-Justice concurrence in the judgment. According to *Glossip*, the three-Justice plurality in *Baze* offered the "narrowest grounds" and so set a controlling precedent. *See* 135 S. Ct. at 2738 & n.2. Interestingly, five Justices who supported the Court's judgment in *Baze* also formed the *Glossip* majority. Perhaps those five Justices always agreed that the plurality opinion in *Baze* would and should create binding precedent under *Marks*. But because the Court did not actually express any such agreement, *Baze*'s precedential implications were left open to question. *See Baze v. Rees*, 553 U.S. 35, 94, 106 (2008) (Thomas, J., concurring in the judgment) (thoroughly rejecting the plurality's proposed standard, including for being "unprecedented and unworkable"). Confirming as much, the four-Justice dissent in *Glossip* argued that *Baze* created no precedent under *Marks*. *See* 135 S. Ct. at 2793 (Sotomayor, J., dissenting).

The point is not that this Court should maximize the amount of precedent or the number of its majority opinions. Disagreement among the members of this Court often counsels in favor of creating less precedent today and more flexibility tomorrow. Fragmented decisions are not in themselves lamentable, and a pivotal fifth Justice who refuses to form a majority opinion may well be acting appropriately. The point is instead that the majority of this Court should retain the ability to determine, on a case-by-case basis, whether there is sufficient agreement to

justify the creation of a precedent. Applying that approach, this Court routinely generates compromise opinions that express majority agreement on a single rule of decision. *See, e.g. Arizona v. Gant*, 556 U.S. 332, 344 (2009); *id.* at 351, 354 (Scalia, J., concurring); *see also Beyond* Marks 40–45 (discussing several examples). By contrast, the narrowest-grounds test transforms minority views into precedents that must be followed nationwide and are insulated from reconsideration by stare decisis.

II. The Parties' Proposed Versions of the *Marks* Rule Are Objectionable

Proponents of the *Marks* rule confront a dilemma: precedent should form only when there is majority agreement on a rule of decision, but the whole point of the *Marks* rule is to view opinions that lack majority support as precedential. In this case, the parties each grasp a different horn of this dilemma. Following the en banc D.C. Circuit and Ninth Circuit, the Petitioner recognizes that precedent should form only when most Justices support a "common rationale." By contrast, the United States follows the decision below in acknowledging that the *Marks* rule applies to rulings without a majority rationale. Each position has something right. And, as a result, both proposed approaches to *Marks* are wrong.

A. The Logical-Subset Test Rests on a Logical Fallacy

The Petitioner, the D.C. Circuit, and the Ninth Circuit have narrowly interpreted the *Marks* rule to apply only when one opinion represents a "logical subset" of another, broader opinion. Pet. Br. 38–44. The basic idea is that someone who supports a broad

position must necessarily—as a matter of logic—support a "narrower" position. *See United States v. Davis*, 825 F.3d 1014, 1016 (9th Cir. 2016) (en banc) (citing *United States v. Epps*, 707 F.3d 337, 350 (D.C. Cir. 2013)). On this view, "*Marks* is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions." *Davis*, 825 F.3d at 1020 (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc)). Expressed graphically, implicit majority approval for a single rationale exists whenever "one opinion supporting the judgment" can "fit entirely within a broader circle drawn by the others." *King*, 950 F.2d at 782.

Unfortunately, the "logical subset" test rests on a logical fallacy—namely, the fallacy of division. What is true of the whole is not necessarily true of its component parts. For example, salt is edible, but one of its components (chlorine) is toxic. Likewise, approval of a broad rule does not imply approval for any of its component rules or outcomes. *See Beyond* Marks 29. Imagine that four Justices categorically opposed prosecutions for political protests, while a single Justice opposed such prosecutions unless the protestors were communists. *Cf. Dennis v. United States*, 341 U.S. 494, 547 (1951) (Frankfurter, J., concurring in the judgment). Would the plurality necessarily support a First Amendment rule that protected everyone except communists? Of course not. The plurality might think that an exception for communists epitomized impermissible content-based discrimination. Reasons for breadth do not always tolerate narrowness, and exceptions can create their own problems.

Thus, supporters of broad views are not compelled to endorse—or even tolerate—"narrower" ones.

The fallacy underlying the logical-subset test is particularly visible in the D.C. Circuit's attempt to explain how the *Marks* rule applied in *Marks* itself, *see King*, 950 F.2d at 781 (citations omitted):

> In [*Memoirs v. Massachusetts*, 383 U.S. 413 (1966)], three separate views supported the judgment that the book was not obscene: the view expressed in the plurality opinion, which said that a book had to be "utterly without redeeming social value" to be considered obscene; the view of Justice Stewart that only "hardcore" pornography could be banned as obscene; and the view of Justices Black and Douglas, who believed that obscenity could never be banned. Because Justices Black and Douglas had to agree, as a logical consequence of their own position, with the plurality's view that anything with redeeming social value is not obscene, the plurality of three in effect spoke for five Justices.

Not so. Categorical opposition to obscenity prosecutions does not, "as a logical consequence," entail support for any narrower view, much less a rule allowing obscenity prosecutions for works that are "utterly without redeeming social value." In taking a categorical position, Justices Black and Douglas might have wanted to avoid precisely the kind of judgments that the plurality's "social value" inquiry called for. Or they might have thought that the First Amendment's language demanded a categorical answer, one way or the other. If Justices Black and Douglas had actually

wanted "the plurality of three" to speak "for five Justices" in *Memoirs*, they could have formed a majority opinion—as they did in other cases. *See, e.g.*, *Time, Inc., v. Hill*, 385 U.S. 374, 398 (1967) (Black, J., concurring) ("I do this, however, in order for the Court to be able at this time to agree on an opinion in this important case . . . ."); *id.* at 402 (Douglas, J., concurring) (similar).

On reflection, the ambition of the logical-subset test is incompatible with the *Marks* rule. The stated goal of looking for a logical subset is to find "implicit" majority rationales hidden within fragmented decisions. *See King*, 950 F.2d at 781 ("[T]he narrowest opinion must represent a common denominator of the Court's reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment."). But, by its terms, the *Marks* rule applies "[w]hen . . . no single rationale explaining the result enjoys the assent of five Justices." *Marks*, 430 U.S. at 193. So the logical-subset test is actually at odds with *Marks* itself.

The en banc Ninth Circuit decision in *Davis v. United States* is a case in point. *Davis* opened its analysis by noting that "[f]ive justices ultimately agreed that Freeman was eligible for a reduction, but no rationale commanded a majority of the Court." 825 F.3d at 1019. That obvious point is what made the *Marks* rule applicable: *Freeman* was indeed a case in which "no single rationale explaining the result enjoys the assent of five Justices." *Marks*, 430 U.S. at 193. Yet the Ninth Circuit went on to conclude that a "fractured Supreme Court decision should only bind the federal courts of appeal when a majority of the Justices agree upon a single underly-

ing rationale." 825 F.3d at 1022. Paradoxically, the Ninth Circuit appeared to believe both that the *Marks* rule should apply where there is no majority rationale and that the rule applies only when there is a majority rationale. Alas, there is no "logical" way to have the *Marks* rule and a rule of majority agreement, too. This Court must choose.

B. The Convergent-Results Test Treats Outlier Views as Precedential

Some approaches to the *Marks* rule do not purport to identify majority agreement on a rule of decision. Instead, these approaches seek out convergent results—that is, discrete case outcomes that most Justices would agree with. The Eleventh Circuit decision below adopted a relatively stringent version of this approach: "*Marks* requires us to find a legal standard which, when applied, will necessarily produce *results* with which a majority of the Court from that case would agree." Pet. App. 12a (internal quotation marks and citations omitted); *see also id.* at 7a (purporting not to consider dissents when finding results convergence). This approach, which might be called the "convergent-results test," concedes that the *Marks* rule cannot uncover majority agreement on a rationale. *See id.* at 11a. The United States has adopted that approach. *See* BIO 10–11, 13.

The basic problem with the convergent-results test is that it systematically prefers outlier views among the Members of this Court. *Freeman* is illustrative. Again, eight Justices in *Freeman* disagreed with the rule put forward by Justice Sotomayor's concurrence in the judgment. Even if most Justices would necessarily reach the same result as the con-

currence in the judgment in any given case, that assumption would not provide a persuasive reason to view Justice Sotomayor's position as establishing a precedential rule. If anything, the various opinions in *Freeman* suggest that lower courts—and this Court—should approach Justice Sotomayor's solitary view with caution. Yet the convergent-results test would treat that outlier view as a binding, nationwide precedent. *See King*, 950 F.2d at 782 ("When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be proper to endow that approach with controlling force, no matter how persuasive it may be.").

To be clear, lower courts should give respectful consideration to the views expressed in single-Justice opinions. Solitary opinions play an important role in the law's development and have sometimes even been vindicated by later opinions of the Court. *See, e.g.*, *Grutter*, 539 U.S. at 325 (adopting the analysis set out by Justice Powell's solo opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 (1972)); *see also Riley v. California*, 134 S. Ct. 2473, 2490 (2014) (citing *United States v. Jones*, 565 U.S. 400, 413 (2012) (Sotomayor, J., concurring)). But outlier views should become precedential only if and when they actually attain the Court's approval—and so are no longer outlier views at all.

The convergent-results test could be defended as a product of a predictive model of precedent, whereby lower courts attempt to anticipate how this Court would rule in discrete cases. However, this Court has generally discouraged lower courts from engaging in such predictions when construing precedent, *see Rodriguez de Quijas v. Shearson/American Express*,

Inc., 490 U.S. 477, 484 (1989), and for good reason. Predictions about how the Members of this Court will rule often turn out to rest on unwarranted speculation. And an emphasis on prediction tends to discourage new thinking about the merits—even though, in revisiting fragmented decisions, this Court can benefit from new insights that have percolated in the lower courts. *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (noting "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals"). Finally, and most importantly, predictions that do not accord with majority views of the law may generate objectionable patterns—as *Freeman* again illustrates. *See also supra* pp. 8–9 (supplying other examples). The risk of generating objectionable rules may also explain why the decision below disavowed reliance on dissenting opinions, despite their evident predictive utility. *See* Pet. App. 7a.

As long as there is appellate review, lower courts will wonder how higher-court judges might vote in future rulings. But those predictions are not—and should not be—binding precedent.

III. Stare Decisis Should Not Protect the *Marks* Rule

The *Marks* rule plays a significant and growing role in legal practice, yet there is a powerful case for abandoning it. *See* Pet. Br. 55–59 (arguing in the alternative that the Court should revisit the rule). "[W]hen governing decisions are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent." *Payne*, 501 U.S. at 827–28. And because the *Marks* rule "is judge made and impli-

cates an important matter involving internal Judicial Branch operations," the responsibility to take corrective action lies with this Court. *Pearson v. Callahan*, 555 U.S. 223, 233–34 (2009). Importantly, the stare decisis inquiry must consider the *Marks* rule as it has actually been stated and applied in the past—not as one might hope it will be applied in the future.

This Court's decision to adopt the narrowest-grounds test in *Marks* wasn't just "badly reasoned." *Payne*, 501 U.S. at 827. It wasn't reasoned at all. Before *Marks*, courts recognized a majority rule of precedent formation and did not generally apply the narrowest-grounds test. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 356–61 (2012) (discussing the default majority rule); Comment, *Supreme Court No-Clear Majority Decisions: A Study in Stare Decisis*, 24 U. Chi. L. Rev. 99, 100 & n.10, 155 (1956) (collecting authorities on fragmented decisions). The only relevant authority that *Marks* cited was the plurality opinion in *Gregg v. Georgia*, which in turn cited no relevant authority. *See Marks*, 430 U.S. at 193 (quoting *Gregg*, 428 U.S. at 169 n.15 (plurality opinion)). Moreover, neither *Marks* nor the *Gregg* plurality provided any justification for adopting the narrowest-grounds test. That lack of reasoning is especially remarkable because *Marks* could have rested its outcome on a variety of narrower grounds. *See Grutter v. Bollinger*, 288 F.3d 732, 779 (6th Cir. 2002) (Boggs, J., dissenting) ("Taken on its face, *Marks* might be read only for the limited proposition that a criminal defendant cannot be held liable for conduct that he did not have fair notice would be prohibited."); *Beyond* Marks 5–8.

Experience has confirmed the *Marks* rule's theoretical shortcomings. In two separate decisions, this Court has already acknowledged not only that the *Marks* rule "baffled and divided the lower courts that have considered it," but also that the "test is more easily stated than applied." *Grutter*, 539 U.S. at 325 (quoting *Nichols*, 511 U.S. at 745–46). Lower courts have likewise lamented the indeterminacy of the narrowest-grounds test. *E.g.*, *Davis*, 825 F.3d at 1020 ("In the nearly forty years since *Marks*, lower courts have struggled to divine what the Supreme Court meant by 'the narrowest grounds.'"). The circuit split over *Freeman* is just the latest example of the rule's unworkability and tendency to foster confusion.

The strongest argument for retaining the *Marks* rule would focus on the possible disruptive effects of repudiating it. If the *Marks* rule were abandoned, cases that had applied the *Marks* rule would not have been overruled, but they might be cast into doubt. *Cf. Crawford v. Washington*, 541 U.S. 36, 60 (2004) (repudiating the "rationales" of this Court's earlier rulings but reassuringly noting that "the results of our decisions have generally been" correct). Further, this Court has issued many fragmented decisions that may have assumed the future operation of the *Marks* rule; and lower courts, including state courts, have used the rule with rapidly increasing frequency. *See Beyond* Marks at 8–16 (showing rising numbers of *Marks* rule citations in appellate courts). Looking to *Marks* citations may even underestimate the rule's influence, since courts sometimes rely on the rule without citing it. Unless this Court changes course, the *Marks* rule may soon become a framework ruling on judicial method. At first blush, reversing this

trend might seem like a tall order. Yet the disruptive effects of abandoning the *Marks* rule are not as great as appearances may suggest.

Marks rule citations are concentrated on a relatively small number of rulings, presumably because courts engage the rule only when a fragmented decision is the key precedent in an area and the choice between competing opinions is potentially outcome-determinative. *See Beyond* Marks 8–16. Yet the cases that are most often "*Marks*'d" have tended to generate intractable circuit splits. *See id.* Besides *Freeman*, examples include *United States v. Santos*, 553 U.S. 507 (2008), *Rapanos v. United States*, 547 U.S. 715 (2006), and *Missouri v. Seibert*, 542 U.S. 600 (2004). *See Garland v. Roy*, 615 F.3d 391, 402–03 (5th Cir. 2010) ("The other circuits that have analyzed *Santos* and Justice Stevens' concurring opinion, have adopted four different views of *Santos*'s holding."); *United States v. Lipar*, 665 Fed. App'x 322, 325 (5th Cir. 2016) ("[F]ollowing *Rapanos*, a split decision of the Supreme Court, there still exists a circuit split on the [relevant] statute's interpretation."); *United States v. Ray*, 803 F.3d 244, 270–72 (6th Cir. 2015) (discussing a three-sided circuit split on how the *Marks* rule applies to *Seibert*). Thus, the *Marks* rule has tended to generate the kind of uncertainty and confusion that is disentitled to stare decisis protection. *See Payne*, 501 U.S. at 827–28.

Other frequently *Marks*'d cases, such as *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011), and *Williams v. Illinois*, 567 U.S. 50 (2012), have yielded little guidance, either because the apparently "controlling" opinion seemingly does not change the law or because courts often—though not always—

agree that there is no discernible holding at all. *See, e.g.*, *AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1363 (Fed. Cir. 2012) ("The narrowest holding is that which can be distilled from Justice Breyer's concurrence—that the law remains the same after *McIntyre*."); *State v. Norton*, 443 Md. 517, 542 (2015) ("[M]any other courts also have struggled to interpret *Williams* and apply its tenets.").

What is more, some apparent reliance on the *Marks* rule is illusory, in that the same precedential guidance would be available after *Marks*'s overruling. Whenever majority agreement across fragmented decisions is discernible, precedent would remain, even without *Marks*. *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (expressing majority agreement that the Second Amendment is incorporated, despite disagreement on why); *id.* at 805–06 (Thomas, J., concurring in part and concurring in the judgment). In addition, some oft-*Marks*'d cases have been superseded by majority decisions that have addressed the underlying merits. Examples include *Baldasar v. Illinois*, 446 U.S. 222 (1980), which was revisited in *Nichols*, as well as *Bakke*, which was revisited in *Grutter*.

Finally, adopting any specific version of the *Marks* rule is bound to be disruptive. Many courts apply *Marks* differently from either the Petitioner or the decision below. For example, some courts expressly consider dissenting opinions and find precedential guidance that spans multiple opinions. *See, e.g.*, *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009) (following the *Rapanos* "dissent's instruction to find jurisdiction if either the plurality's test or Justice Kennedy's test is met"); *see also Beyond*

Marks 24–36 (criticizing several other versions of the *Marks* rule). Because lower courts have adopted myriad approaches to fragmented decisions, significant disruption is inevitable if the narrowest-grounds test is to be clarified. Under those circumstances, this Court should pursue the best rule available, unimpeded by stare decisis.

The *Marks* rule has fostered confusion and offered little unique guidance. Abandoning the rule would not be costless. But it is justified.

CONCLUSION

Instead of viewing *Freeman* as precedential, this Court should abandon the *Marks* rule in favor of a simple majority rule.

Respectfully submitted,

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